No. 91-688

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC., and COMMODORE AVIATION, INC.,

Petitioners,

—v.—

MARIA BERNARDA ALVAREZ, as Personal Representative of the Estate of Amanda Maria Alvarez, Deceased, and on behalf of PEDRO P. ALVAREZ and MARIA BERNARDA ALVAREZ,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of a District Court that the cause of action created by the Warsaw Convention is not exclusive, which decision is separate from and preceded consideration of a motion to remand the case to the state court from which removed, is insulated from federal appellate review by 28 U.S.C. § 1447(d)?

PARTIES TO THE PROCEEDING BELOW

The parties before the Court and to the proceedings below are:

1. Petitioners AEROVIAS NACIONALES DE COLOMBIA, S.A. (AVIANCA), AVIANCA, INC. and COMMODORE AVIATION, INC. (COMMODORE).

2. Respondents Maria Bernarda Alvarez, as personal representative of the Estate of Amanda Maria Alvarez (Deceased), and on behalf of Pedro P. Alvarez and Maria Bernarda Alvarez.

RULE 29.1 LIST

1. AVIANCA has the following non-wholly owned subsidiaries: Helicopteros Nacionales de Colombia, S.A. (Helicol), Aerocomercio Internal Ltda., Sociedad Productora y Comerc. de Alimentros Ltda. (Presto), Corporacion de Viajes Ltda. (Coviajes) and Sociedad Aeronautica de Medellin Consolidada, S.A. (SAM).

2. AVIANCA, INC. is a wholly owned subsidiary of AVIANCA.

3. COMMODORE is a subsidiary of Israel Aircraft Industries International, Inc.

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The Petitioners AEROVIAS NACIONALES DE COLOMBIA, S.A. (AVIANCA), AVIANCA, INC. and COMMODORE AVIATION, INC (COMMODORE) respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit, entered in the above-captioned proceeding on October 4, 1991, dismissing the appeal of the Petitioners.

OPINIONS BELOW

The unreported Order of the Court of Appeals for the Eleventh Circuit is reprinted in the Appendix hereto at 1a, *infra*.

The Memorandum Opinion and Order of Remand of the United States District Court for the Southern District of Florida (King, J.) is reported at 756 F. Supp. 550, and is reprinted in the Appendix hereto at 2a, *infra*.

JURISDICTION

The Order of the Court of Appeals for the Eleventh Circuit was entered on October 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 28 U.S.C. § 1447(d) which provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

On January 25, 1990, an AVIANCA Boeing 707 aircraft operating as Flight 052 from Colombia to New York crashed in the vicinity of Cove Neck, New York. Of the 149 passengers on board, 65 were killed and 84 were injured. Numerous passenger wrongful death and personal injury actions were filed against Petitioners in various United States District Courts and in the state courts of Florida. The Judicial Panel on Multidistrict Litigation transferred all federal actions to the Eastern District of New York and Chief Judge Thomas C. Platt for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *In re Air Disaster Near Cove Neck, New York, on January 25, 1990*, No. 843 (J.P.M.D.L. June 14, 1990).

The present case involves one of the wrongful death actions arising out of the crash. Respondents' decedent was travelling on AVIANCA Flight 052 pursuant to a ticket which provided for "international transportation" within the meaning of Article 1 of a treaty of the United States known as the Warsaw Convention.[1] It is undisputed that the Warsaw Convention is applicable to this and the other pending actions arising out of the crash of Avianca Flight 052.[2]

The action originally was commenced in the Circuit Court for Dade County, Florida and sought relief solely pursuant to the Florida Wrongful Death Statute. The Complaint as filed did not make reference to the Warsaw Convention or assert any rights thereunder, although the Complaint did allege that Respondents' decedent was killed in the accident involving AVIANCA Flight 052 on January 25, 1990. The Complaint also alleged that Respondents' decedent was travelling pursuant to a ticket for AVIANCA Flight 052 which originated in Colombia and was destined for New York.

The District Court Proceedings: Petitioners timely removed the action to the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. §§ 1331 and 1441 on the ground that Respondents' claims arise under and are governed by the Warsaw Convention and federal question jurisdiction therefore exists.[3]

After removal, Respondents moved to remand the action on the ground that the Complaint did not invoke or raise any

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1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. App. § 1502.

2 The Warsaw Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw Convention, Article 1, 49 Stat. 3014. It also is undisputed that Article 17 of the Convention creates a cause of action for wrongful death. *See Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

3 It is conceded that removal was available only on federal question grounds.

federal law, treaty or statute and was founded solely on the Florida Wrongful Death Statute. In support of the motion, Respondents argued that the Warsaw Convention does not provide the exclusive cause of action but provides only an exclusive *remedy* that preempts inconsistent state law remedies. Therefore, Respondents' argument continued, there was no federal question involved so as to confer jurisdiction by removal on the District Court pursuant to 28 U.S.C. §§ 1331 and 1441.

In opposing the remand motion, Petitioners argued that regardless of the allegations in the Complaint and the reliance by Respondents on local state law for the alleged cause of action for wrongful death, the Warsaw Convention applied by operation of law to provide Respondents with the exclusive cause of action and therefore removal on federal question jurisdiction grounds was proper.

Prior to addressing or deciding the remand motion, the District Court reached a decision that the Warsaw Convention cause of action is not exclusive even where it unquestionably applies to the transportation. Appendix at 5a-10a, *infra*, 756 F. Supp. at 553-55. In reaching this decision, the District Court, relying on its own 1986 decision in *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986) (King, J.), reasoned as follows:

> At the outset of this discussion, it is important to recognize that the availability of a federal cause of action founded upon the Warsaw Convention has been squarely resolved in the circuit. . . . If there were no federal cause of action, this court would need to go no further before reaching a decision to remand this case to state court. Because a federal cause of action exists under the Warsaw Convention, however, the court needs to determine whether it is exclusive.
>
> * * *
>
> Although the Warsaw Convention sets forth certain uniform procedural rules with respect to the filing of

> claims, it is clear that the Convention does not presuppose to make such rules completely uniform. . . . The fact that a federal cause of action has been recognized under the Warsaw Convention does not change the fact that the Convention leaves matters to local law.
>
> * * *
>
> [V]arious courts, including the *Velasquez* court, have taken the contrary position that a cause of action arising under the Warsaw Convention is the exclusive federal cause of action available to plaintiffs.
>
> * * *
>
> Many of the other courts which state that the Warsaw Convention's cause of action is exclusive have done so without much, if any, discussion; others have simply addressed the issue in dicta. Moreover, these cases also generally fail to analyze the "however founded" language of Article 24(1) and the distinction between remedies and causes of action under the Convention.
>
> * * *
>
> For the reasons set forth above, this court holds that the Warsaw Convention does not create the exclusive cause of action in those cases to which it is applicable.

Appendix at 5a-10a, *infra*, 756 F. Supp. at 553-55.

Following this decision, the District Court then addressed and proceeded to decide the remand motion, holding:

> Having determined that the Warsaw Convention does not create an exclusive cause of action, this court next addresses whether the defendants can properly remove this case.
>
> * * *
>
> Because the plaintiff has set forth a cause of action under state law without bringing in any federal theory and because the Warsaw Convention's cause of action is

> not exclusive, the plaintiff's complaint does not arise under federal law so as to confer removal jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441.

Appendix at 10a-12a, *infra*, 756 F. Supp. at 555-56.

The District Court granted the motion and remanded the action to the Circuit Court for Dade County, Florida. Appendix at 12a, *infra*, 756 F. Supp. at 556.

The Court of Appeals Proceedings: Petitioners filed a Petition for Writ of Mandamus, pursuant to 28 U.S.C. § 1651, requesting the Eleventh Circuit to direct the District Court to vacate the remand order and reinstate the action. The Petition for a Writ of Mandamus was denied on March 8, 1991. Before the Petition was denied, Petitioners also filed a Notice of Appeal from the decision of the District Court that the Warsaw Convention did not provide the exclusive cause of action. Pursuant to a Memorandum of the Court of Appeals dated March 22, 1991, the jurisdictional issue was carried with the case and was fully addressed in the briefs along with the substantive issue of whether the Warsaw Convention provides Respondents' exclusive cause of action.

After Petitioners filed their brief on the merits, Respondents filed a motion to dismiss the appeal on the authority of *Calderon v. Aerovias Nacionales de Colombia, S.A.*, 929 F.2d 599 (11th Cir. 1991), in which an appeal similar to this case was dismissed for lack of appellate jurisdiction. A petition for a writ of certiorari in *Calderon* was filed on September 13, 1991 and currently is pending before the Court. *Aerovias Nacionales de Colombia, S.A. v. Calderon*, No. 91-418 (U.S. cert. filed Sept. 13, 1991). The Court of Appeals, in an Order dated October 4, 1991, granted Respondents' motion and dismissed the appeal in this case simply stating:

> The district court's conclusion regarding the exclusivity of the remedy provided by the Warsaw Convention is inextricably interwoven with its decision to remand the action to state court. Accordingly, its order is not

appealable. *See Calderon v. Aerovias Nacionales de Colombia*, 929 F.2d 599 (11th Cir. 1991).

Appendix at 1a, *infra*.

REASONS FOR GRANTING THE WRIT

The issue presented in this case is the same issue presented in the petition for a writ of certiorari in *Aerovias Nacionales de Colombia, S.A. v. Calderon*, No. 91-418 (U.S. cert. filed Sept. 13, 1991), currently pending before the Court—the extent to which 28 U.S.C. § 1447(d) shields from review a district court's decision regarding the scope and effect of the Warsaw Convention cause of action. As the Convention is a treaty of the United States, this issue has far reaching ramifications, not only on the substantive rights of Petitioners in this case, but on all pending and future actions to which the Convention applies. The court below has expanded the non-reviewability rule of 28 U.S.C. § 1447(d) to encompass, not simply remand orders, but decisions of a substantive non-jurisdictional nature if the decision has a subsequent effect on the separate decision to remand.

The Court of Appeals for the Eleventh Circuit, on the authority of its prior *Calderon* decision, incorrectly held that 28 U.S.C. § 1447(d) precluded it from reviewing the substantive decision of the District Court that the Warsaw Convention did not provide Respondents with the exclusive cause of action and thus dismissed the appeal. In following the *Calderon* decision and holding that it had no jurisdiction to review this substantive decision of the District Court, the Eleventh Circuit has again decided a federal question in a way that conflicts in principle with the applicable decisions of the Court and numerous other Circuit Courts. The Eleventh Circuit thereby has sanctioned such a departure by the District Court from the accepted and usual principles of treaty interpretation as to require the Court to exercise its power of supervision.

The Eleventh Circuit also has incorrectly decided a recurring important question of federal appellate jurisdiction, *viz*, the intended scope of § 1447(d), which should be reviewed and settled by the Court in order to insure uniformity in the application of § 1447(d).

I

THE ELEVENTH CIRCUIT'S FAILURE TO REVIEW THE DISTRICT COURT'S DECISION AS TO THE EXCLUSIVITY OF THE WARSAW CONVENTION CAUSE OF ACTION CONFLICTS IN PRINCIPLE WITH THE COURT'S DECISION IN *WACO V. UNITED STATES FIDELITY & GUARANTY CO.* AND THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL

As in the *Calderon* case, this case does not involve an appeal from a remand order. This case involves an appeal from a district court's substantive legal decision regarding the scope and effect of a treaty of the United States, which *preceded* consideration of a remand motion and ultimate entry of a remand order.

Prior to remanding this action, the District Court decided that the Warsaw Convention does not provide Respondents with the exclusive cause of action. The Eleventh Circuit, in dismissing the appeal, held that 28 U.S.C. § 1447(d) bars review of this decision because the court viewed the District Court's exclusivity decision as "inextricably interwoven with its decision to remand the action to state court." Appendix at 1a, *infra*. This holding of the Court of Appeals is erroneous and conflicts in principle with the Court's decision in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934) and numerous decisions of other Circuit Courts of Appeal.

In *Waco*, 293 U.S. 140 (1934), a case involving a district court's order of dismissal of a party's cross-action (third-party action) which resulted in the remand of the case to

state court, the Fifth Circuit Court of Appeals had dismissed the appeal on the grounds that no appeal lies from an order of remand. In reversing the Fifth Circuit and holding the dismissal order reviewable, the Court stated:

> If the District Court's order stands the cross-action will be no part of the case which is remanded to the state court. Indeed, if the District Court was right, the cause could not have been remanded except for the exclusion of the [third-party defendant] as a party. True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

Waco, 293 U.S. at 143.

The limitations on the scope of the nonreviewability rule as to remand orders, as enunciated by *Waco*, have been recognized by numerous Circuit Courts of Appeal in interpreting and applying 28 U.S.C. § 1447(d). *See Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3d Cir. 1991); *Mitchell v. Carlson*, 896 F.2d 128, 132 (5th Cir. 1990); *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194-95 (6th Cir. 1990); *Karl Koch Erecting Co. v. N.Y. Convention Center Dev. Corp.*, 838 F.2d 656, 658 (2d Cir. 1988); *Allen v. Ferguson*, 791 F.2d 611, 613-15 (7th Cir. 1986); *Clorox Co. v. U.S. Dist. Court for the Northern Dist. of California*, 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984); *Kozera v. Spirito*, 723 F.2d 1003, 1005 n.1 (1st Cir. 1983); *Katsaris v. United States*, 684 F.2d 758, 761 (11th Cir. 1982); *Armstrong v. Alabama Power Co.*, 667 F.2d 1385, 1387 (11th Cir. 1982); *Southeast Mortg. Co. v. Mullins*, 514 F.2d 747, 749 (5th Cir. 1975).

For example, in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), the Court of Appeals for the Ninth Circuit held that appellate jurisdiction

exists to review a substantive legal decision which precedes a remand order. The court held:

> [T]he district court ordered the case remanded to state court after it found the parties' agreement to litigate in state court enforceable. Not only did the court's determination that the forum selection clause was valid and enforceable precede the remand order, it formed the basis of that order. Like the dismissal in *Waco*, the court's decision that the contract clause is enforceable, if not reversed or set aside, is conclusive upon [defendant], and, therefore, must be reviewed. To hold otherwise would deprive [defendant] of its right to appeal a substantive determination of contract law. We cannot believe that Congress intended to immunize such decisions from review.

Pelleport, 741 F.2d at 277.

The general principles and rationale enunciated by the Supreme Court in *Waco* and its progeny are that the statutory nonreviewability rule has its limits and does not extend to insulate from review substantive decisions rendered prior to remand which affect the substantive rights of a party. The extension of 28 U.S.C. § 1447(d) to insulate such decisions from appellate review would deprive a litigant of its right to appeal a substantive legal determination as to the scope and effect of a treaty binding upon that party in subsequent proceedings. *Cf. In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 845-47 (3d Cir. 1991).

As in *Waco*, Petitioners here sought review of a substantive legal decision (*i.e.* the exclusivity of the Warsaw Convention cause of action) that preceded the remand order. In summarily holding that this aspect of the District Court's decision was not reviewable, the Eleventh Circuit sidestepped the essential distinction drawn by the Court in *Waco* between an appeal from a remand order and an appeal from a decision which precedes a remand order, by characterizing the District Court's exclusivity decision as "inextricably interwoven" with the decision to remand. Appendix at 1a, *infra*. It

is this aspect of the Eleventh Circuit's decision which conflicts in principle with *Waco*.[4]

In order to arrive at its result, the court below, as did the court in *Calderon*, ignored that the District Court first and separately rendered a substantive decision that the Warsaw Convention cause of action was not exclusive and that Respondents, at their option, could bring a wrongful death action under local state law, even where the Convention unquestionably applies. Only after this decision had been rendered did the District Court then proceed to address and then decide the remand motion. The District Court specifically segregated the exclusivity issue from the jurisdictional issue and first addressed, at some length and in a separately labelled section, the exclusivity issue. The District Court itself recognized that it was making a substantive legal decision apart from the jurisdictional issue when it stated:

> If there were no federal cause of action, this court would need to go no further before reaching a decision to remand this case to state court. Because a federal cause of action exists under the Warsaw Convention, however, the court needs to determine whether it is exclusive.

Appendix at 6a, *infra*, 756 F. Supp. at 553.

Only after the District Court had decided that the federal Warsaw Convention cause of action is not exclusive did the District Court separately address the remand issue:

> Having determined that the Warsaw Convention does not create an exclusive cause of action, this court next

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4 The District Court's decision prior to remand, that the Warsaw Convention does not provide Respondents' exclusive cause of action, is a binding legal decision which affects the substantive rights of Petitioners and is appealable as a final collateral order pursuant to 28 U.S.C. § 1291. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Foster*, 933 F.2d at 1211; *Pelleport*, 741 F.2d at 278. The decision in effect ends the litigation in the federal forum, amounting to a dismissal since its effect is to surrender jurisdiction to the state court and, if not appealable now, the order will be unreviewable. *Id.*

> addresses whether the defendants can properly remove this case.

Appendix at 10a, *infra*, 756 F. Supp. at 555.

It is clear that the decision to remand was not based on the allegations of the Complaint but necessarily was preceded by the substantive legal decision of the District Court that the Warsaw Convention cause of action is not exclusive. The District Court's erroneous decision on this issue should not be insulated from review because it preceded a remand order nor because of the Eleventh Circuit's self-serving but faulty view of the decision as "inextricably interwoven" with the remand order.

The court below also ignored the numerous substantive effects that the District Court's decision has on the rights of the parties after remand, apart from the jurisdictional effects. For example, the District Court's decision will affect Petitioners' substantive rights as to the applicable substantive law, choice of law rule and measure of damages. *See In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, 928 F.2d 1267 (2d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3293 (Oct. 15, 1991). The court below, in summarily dismissing the appeal, failed to address these issues.

As with the district court's decision in *Calderon*, the District Court's exclusivity decision in this case can be applied to any Warsaw Convention case and in a non-jurisdictional context. The Court of Appeals in this case simply ignored the wide-ranging nonjurisdictional effects of the District Court's decision, as did the Eleventh Circuit in *Calderon*, and relying on *Calderon*, dismissed the appeal. In this, the court below erred.

The *Calderon* court was confused as to the scope and effect of § 1447(d) and *Waco* in an action governed by the Warsaw Convention. This confusion is evidenced by the preemption cases it relied upon in dismissing the *Calderon* appeal. *See, e.g., Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989); *Glasser v. Amalgamated Workers*

Union Local 88, 806 F.2d 1539 (11th Cir. 1986). The courts in those cases would have reviewed the district court decisions preceding the remand orders but for the fact that the federal law which the defendants there attempted to invoke to support removal did not definitely apply to the factual allegations in the complaints. Thus, the decisions affected only the forum and not the substantive rights of the parties. Unlike *Glasser* and *Hansen*, the applicability of the federal law in this case, the Warsaw Convention, is unquestionable. Moreover, the issue of the exclusivity of the Convention cause of action affects not only the forum in which the case is to be heard but has conclusive binding effects on the substantive rights of the Petitioners in state court subsequent to remand. Even *Glasser* noted that where the district court reaches "the merits of the preemption argument", the decision is reviewable. 806 F.2d at 1540.

The rationale and principle of *Waco* cannot be circumvented to deprive Petitioners of their right to appeal a decision of substantive law simply by labeling that decision as "inextricably interwoven" with the jurisdictional issue or simply because the "exclusivity" issue also affects jurisdiction.

II

THE ELEVENTH CIRCUIT'S DECISION SANCTIONS A DECISION BY THE DISTRICT COURT WHICH SO FAR EXCEEDS THE PERMISSIBLE LIMITS OF TREATY INTERPRETATION AS TO REQUIRE THE EXERCISE BY THE COURT OF ITS SUPERVISORY POWERS

The decision of the Eleventh Circuit in turn effectively has sanctioned the District Court's erroneous decision that the Warsaw Convention does not provide the exclusive cause of action, a decision which has wide-ranging implications beyond the facts of this case.

Although the District Court recognized that the Warsaw Convention creates a federal cause of action for wrongful

death and that numerous decisions have held that this cause of action is the exclusive cause of action for claims arising out of "international transportation," the District Court nevertheless held that the Convention cause of action is not exclusive but only creates the exclusive "remedy." Appendix at 10a, *infra*, 756 F. Supp. at 555. In reaching this decision, the District Court failed to properly review the language, goals and drafting history of the Convention, contrary to well established rules of treaty interpretation. *See Eastern Airlines, Inc. v. Floyd*, 113 L. Ed. 2d 569 (1991); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989); *Air France v. Saks*, 470 U.S. 392 (1985); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984).

The language, goals and drafting history of the Warsaw Convention establish that the Convention was intended to create *the* uniform cause of action for damages arising out of international transportation by air. As a treaty which was created for the purpose of establishing uniform rules with respect to the liability of air carriers, the Convention exclusively governs the rights and responsibilities of passengers and carriers wherever it applies. *See Lockerbie*, 928 F.2d 1267; *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985); *Velasquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F. Supp. 670 (S.D. Fla. 1990); *Eggink v. Trans World Airlines, Inc.*, 22 Av. Cas. (CCH) 17,731 (S.D.N.Y. 1990). As the court stated in *Lockerbie*:

> The principal purposes that brought the Convention into being and presumably caused the United States to adhere to it were a desire for uniformity in the laws governing carrier liability and a need for certainty in the application of those laws. Hence, the test to be applied is whether these goals of uniformity and certainty are frustrated by the availability of state causes of action for death and injuries suffered by passengers on international flights. We do not see how the existence of state

> law causes of action could fail to frustrate these purposes.

Lockerbie, 928 F.2d at 1275 (citations omitted).

The District Court's non-exclusivity decision is not an isolated incident. The practice prevails in the Southern District of Florida of permitting plaintiffs to avoid the full application of the Warsaw Convention to wrongful death and personal injury actions simply by not mentioning the Convention in the complaint. The *Rhymes* and *Calderon* cases are clear examples. In failing to review the District Court's decision regarding the exclusivity of the Warsaw Convention cause of action, the Eleventh Circuit sanctions this practice. Of even greater import, the court below has tacitly decided that the application of the uniform liability rules of the Convention is at the option of the plaintiff. The Court should exercise its supervisory powers in order to ensure the consistent and uniform application of the Warsaw Convention and its goals.

III

THE DECISION BELOW RAISES RECURRING IMPORTANT AND UNRESOLVED QUESTIONS OF FEDERAL APPELLATE JURISDICTION

The scope of § 1447(d) in relation to the wholesale remand of Warsaw Convention cases in the Southern District of Florida, and eventually throughout the Eleventh Circuit, raises a recurring important question of federal appellate jurisdiction which should be clarified and resolved by the Court.

A. Review is Necessary to End Confusion Among Lower Courts and Litigants Interpreting 28 U.S.C § 1447(d)

The courts have given § 1447(d) and *Waco* inconsistent interpretations which has led to confusion and irreconcilable conflicts among the lower courts as to the application of § 1447(d) and its effect on the litigants.

Confusion exists as to whether a substantive decision preceding a remand order merely is "interwoven with" or "intrinsic to" the remand, or whether such a decision is separate and apart from the remand order and, thus, reviewable. *See, e.g., Calderon*, 929 F.2d 599; *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406 (5th Cir. 1991); *Hansen*, 891 F.2d 1384; *Whitman v. Raley's, Inc.*, 886 F.2d 1177 (9th Cir. 1989); *Glasser*, 806 F.2d 1539; *Allen*, 791 F.2d 611; *Clorox*, 779 F.2d 517; *Pelleport*, 741 F.2d 273. The lack of any definitive guidance or standard has resulted in the development of questionable rationale and doctrines which often ignore the substantive effects of such decisions on the parties after remand. *See, e.g., Soley*, 923 F.2d 406; *Whitman*, 886 F.2d 1177. Indeed, the doctrine adopted in *Whitman* and *Soley*, as to whether a pre-remand decision is reviewable, is unworkable and irrelevant in a Warsaw Convention case such as here, because only the effect of the Convention, and not its applicability, is disputed.

Similarly, some courts have held that while a substantive decision preceding a remand order is reviewable, the court is powerless to reinstate the action in federal court even if the substantive decision preceding remand was erroneous. *See, e.g., Tillman v. CSX Transportation, Inc.*, 929 F.2d 1023 (5th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3262 (Oct. 7, 1991); *Soley*, 923 F.2d 406; *Allen*, 791 F.2d 611. Yet other courts not only have reviewed the substantive decision preceding a remand order but have reinstated the action in federal court. *See, e.g., Foster*, 933 F.2d 1207; *Mitchell*, 896 F.2d 128; *Regis*, 894 F.2d 193; *Clorox*, 779 F.2d 517; *Katsaris*, 684 F.2d 758.

Courts also have held that it is within the state court's discretion, after remand, to determine the preclusive effects of a district court's pre-remand substantive decision in the state court proceedings. *Hansen*, 891 F.2d 1384; *In re Life Ins. Co. of N. America*, 857 F.2d 1190 (8th Cir. 1988); *Pelleport*, 741 F.2d 273. Other courts have simply defined this troubling issue away, concluding that the district court's pre-remand decision would have no preclusive effect on the state court's

consideration of the same issue. *Soley*, 923 F.2d 406; *Whitman*, 886 F.2d 1177; *Survival Systems Division of the Whittaker Corp. v. U.S. Dist. Court for the Southern Dist. of California*, 825 F.2d 1416 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988); *Glasser*, 806 F.2d 1541. In summarily dismissing the appeal, the court below did not consider the preclusive effect that the District Court's non-exclusivity decision would have on the rights of Petitioners in the subsequent state court proceedings.

Review by the Court is necessary to provide definitive guidance to end the recurring confusion and conflict among the lower courts in the application and interpretation of *Waco* and § 1447(d), particularly in relation to the intended scope of the Warsaw Convention cause of action.

B. The Eleventh Circuit Decision Extends the Nonreviewability Rule Beyond the Limits of 28 U.S.C. § 1447(d)

The Eleventh Circuit's extension of the nonreviewability rule to an exclusivity decision preceding a remand order, in actions governed by the Warsaw Convention, is improper and is contrary to the purpose, intent and scope of both § 1447(d) and the Warsaw Convention. The policy underlying the nonreviewability of remand orders is conspicuously absent in cases such as this. The rationale for the rule is to prevent delay by protracted litigation over simple jurisdictional issues and is justified where the decision affects only the forum. This rationale is not applicable when a decision which precedes and then results in the remand order affects the substantive rights of a party after remand. In *Waco*, the Court recognized the right of a litigant, such as Petitioners, to appeal a conclusive substantive legal decision which preceded a remand order. The Court declined to extend the nonreviewability rule to such decisions because to do so would extend the rule beyond its intended scope and purpose. Therefore, "where a district court bypasses the jurisdictional arguments and reaches the merits of a . . . dispute, the policy [of § 1447(d)] is inapplicable. Any delay caused by [the]

appeal . . . is a delay that must be countenanced." *Pelleport*, 741 F.2d at 277.

Federal question removal jurisdiction was intended to provide a federal forum for the protection of federal rights and to encourage the development of expertise by federal courts in the interpretation and application of federal law. *Boys Mkts., Inc. v. Retail Clerk's Union Local 770*, 398 U.S. 235, 246 n.13 (1970).[5] The Court has granted certiorari to ensure the uniform interpretation of treaties and has granted certiorari to ensure the uniform and consistent interpretation of the Warsaw Convention in accordance with the express goals of the drafters of the treaty. *See Floyd*, 113 L. Ed. 2d at 584-88; *Chan*, 490 U.S. at 134 n.5; *Saks*, 470 U.S. at 399; *Franklin Mint Corp.*, 466 U.S. at 247, 255-56. The extension of § 1447(d) to encompass the District Court's determination that the Warsaw Convention cause of action is not exclusive runs directly counter to the goal of uniformity sought to be achieved by the treaty. The effect of the Eleventh Circuit decision in this case is to allow each district court to reach its own conclusion as to the scope and effect of the Convention. This has resulted in inconsistent decisions which as of now are held in the Eleventh Circuit to be completely insulated from review.[6] Congress certainly did not intend to immunize from federal appellate review a matter of treaty interpretation by the nonreviewability rule.

The District Court effectively has subordinated a treaty of the United States, created for the express purpose of creating

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5 The extension of the nonreviewability rule to the decision in this action not only binds Petitioners to an erroneous and adverse decision as to the Warsaw Convention by the District Court, but frustrates, rather than facilitates, the formation of a uniform, interpretive body of federal law.

6 There are even conflicting decisions in the Southern District of Florida on this exclusivity issue. *Compare Velasquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F. Supp. 670 (S.D. Fla. 1990) (Convention cause of action is exclusive and removal proper) with *Rhymes v. Arrow Air, Inc.*, 636 F. Supp. 737 (S.D. Fla. 1986) (Convention cause of action is not exclusive and removal improper).

a uniform system of liability, to a state wrongful death statute. Given the increasing frequency with which plaintiffs are adopting this ploy to avoid the full effect of the Convention, the issue of the reviewability of such pre-remand decisions will recur and continue to escalate until the Court resolves this important issue.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: October 24, 1991

APPENDIX

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-5197

Filed October 4, 1991

MARIA BERNARDA ALVAREZ, as personal representative of the Estate of Amanda Alvarez, Deceased and on behalf of Pedro Alvarez and Maria Bernarda Alvarez,

Plaintiff-Appellee,

—versus—

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA INC., AND COMMODORE AVIATION, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

Before:

FAY, HATCHETT and DUBINA,

Circuit Judges.

BY THE COURT:

Appellee's motion to dismiss the appeal is GRANTED. The district court's conclusion regarding the exclusivity of the remedy provided by the Warsaw Convention is inextricably interwoven with its decision to remand the action to state court. Accordingly, its order is not appealable. *See Calderon v. Aerovias Nacionales de Colombia*, 929 F.2d 599 (11th Cir. 1991).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 90-2494-CIV.

Jan. 25, 1991

Maria Bernarda ALVAREZ, as Personal Representative of the Estate of Amanda Maria Alvarez, Deceased, and on behalf of Pedro P. Alvarez and Maria Bernarda Alvarez,

Plaintiff,

—v.—

AEROVIAS NACIONALES de COLOMBIA, S.A., Avianca, Inc., and Commodore Aviation, Inc.,

Defendants.

MEMORANDUM OPINION AND ORDER OF REMAND

JAMES LAWRENCE KING, *Chief Judge*.

This case arises out of the tragic airplane crash of Avianca Flight 52 in Cove Neck, New York, on January 25, 1990. The case was originally filed as a wrongful death action in the Circuit Court in and for Dade County, Florida. The defendants removed the action to this court, claiming that removal was proper because the Warsaw Convention[1] provided the plaintiff's exclusive cause of action. This case is now before the court on the plaintiff's motion to remand the case to state court.

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1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, adhered to by the United States June 27, 1934, 49 Stat. 3000, 3014, reprinted in 49 U.S.C.App. § 1502 note (1988) (hereinafter "Warsaw Convention").

The basis for the defendants' removal of this action to this court stems from the fact that the accident was one of "international transportation." Article 1(1) of the Warsaw Convention states: "This Convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire." At the time of the crash, Flight 52 was en route from Medellin, Colombia, to John F. Kennedy Airport in New York. Defendants assert that, inasmuch as plaintiff's decedent was travelling pursuant to a ticket which provided for "international transportation" within the meaning of the Warsaw Convention, the provisions of the Warsaw Convention apply to this action and exclusively govern it.

Before delving into the issues which comprise the parties' arguments for removal and remand of this case, the court must first address another matter. In another case arising out of the crash of Avianca Flight 52, the defendants removed the action to the Southern District of Florida. *Calderon v. Aerovias Nacionales de Colombia*, 738 F. Supp. 485 (S.D.Fla.1990) (Aronovitz, J.), *appeal filed*, No. 90-5560 (11th Cir.1990). In *Calderon*, Judge Aronovitz entered an order remanding the case to state court. The defendants appealed the decision, and oral argument before the Eleventh Circuit Court of Appeals was heard on December 20, 1990. Defendants have asked this court to delay ruling on the motion to remand pending the result of the *Calderon* appeal, but this court must reject that request for several reasons.

First, although it is possible that the appellate decision could affect the outcome in this case, the oral argument in the appellate court and the applicable precedent in the area of remand reveal that the Eleventh Circuit is probably more concerned with the issues of appellate jurisdiction and reviewability than with the issues which this court faces. The Eleventh Circuit has also already denied a petition for mandamus in *Calderon*.

Furthermore, a deferred ruling could result in a mooting of the issue raised by the parties, due to the probability of a transfer of this case from this jurisdiction by the Judicial Panel on Multidistrict Litigation. Although the defendants have asserted that no hearing on transfer has been scheduled

within the near future, the Judicial Panel on Multidistrict Litigation has already transferred several cases arising from this same air disaster to the United States District Court for the Eastern District of New York.

Finally, it is the duty and responsibility of this court to proceed deliberately toward a decision in this case. Should the Eleventh Circuit reach and decide the issues now before this court in a different manner, the parties in this case can then seek appropriate relief.

State Law Causes of Action and the Warsaw Convention

Plaintiff filed her complaint in state court, grounding the action in state wrongful death law and nowhere invoking any federal law or statute as a basis for her claim. In the notice of removal, the defendants have asserted the right to remove this case to federal court pursuant to 28 U.S.C. §§ 1441 and 1331, claiming that the Warsaw Convention provides the exclusive federal cause of action under the facts alleged in the complaint. The defendants argue that their notice of removal properly vested this court with removal jurisdiction, because plaintiff's attempt to plead this case under the Florida Wrongful Death Act, without reference to federal law and the Warsaw Convention, is simply an attempt to circumvent an exclusively federal cause of action founded upon the Convention. They argue that, in the context of a case in which the Warsaw Convention applies, no state cause of action is available as a theory of liability.

In support of the motion to remand to the Florida court, however, the plaintiff argues that the Warsaw Convention does not provide the exclusive cause of action. Rather, the plaintiff argues that her action can proceed as a state law cause of action that is bounded by the exclusive *remedy* provided for in the Warsaw Convention. Thus, the plaintiff argues, the Warsaw Convention provides an exclusive remedy that may preempt inconsistent remedies otherwise available under state law, but state law theories may still provide the cause of action. Removal would therefore be inappropriate because the exclusive remedy limitations of the Warsaw Con-

vention would be no more than a defense to a valid state law cause of action.

In addressing the arguments set forth by the parties in their briefs and at oral argument, including the argument of the *amicus curiae*,[2] the court must address two inconsistent decisions that were rendered in this district. The first decision was reached by this court in 1986 in *Rhymes v. Arrow Air, Inc.*, 636 F.Supp. 737 (S.D.Fla.1986) (King, C.J.). The second decision was reached several months ago in *Velasquez v. Aerovias Nacionales de Colombia, S.A.*, 747 F.Supp. 670 (S.D.Fla.1990) (Scott, J.). These two memorandum opinions each address the issues presented in the motion to remand *sub judice*, but each comes to a different conclusion as to the exclusivity of the federal cause of action available under the Warsaw Convention. Neither the United States Supreme Court nor the United States Court of Appeals for the Eleventh Circuit has yet provided a definitive answer to this question of exclusivity, *see Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1482 & n. 33 (11th Cir.1989), *cert. granted*, ____ U.S. ____, 110 S.Ct. 2585, 110 L.Ed.2d 266 (1990), but the language and history of the Warsaw Convention, as they have been interpreted by the courts, provide the necessary guidance to resolve this issue.

The Cause of Action Under the Warsaw Convention

At the outset of this discussion, it is important to recognize that the availability of a federal cause of action founded upon the Warsaw Convention has been squarely resolved in this circuit. *See Floyd*, 872 F.2d at 1469-70; *see also Velasquez*, 747 F.Supp. at 675; *Rhymes*, 636 F.Supp. at 739-40. Although many initially assumed that the Warsaw Convention created a cause of action, for decades following the United States' adherence to the Convention, the courts of the United States did not even interpret the Convention as creat-

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2 Representing the *amicus curiae*, Guillermo Camargo, the law firm of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin filed a memorandum and appeared at the hearing before this court in support of the plaintiff's motion to remand.

ing an independent cause of action. Beginning in the late 1970's, however, courts reexamining this issue have generally changed course and recognized the existence of an independent cause of action founded upon the Warsaw Convention.[3] If there were no federal cause of action, this court would need to go no further before reaching a decision to remand this case to state court. Because a federal cause of action exists under the Warsaw Convention, however, the court needs to determine whether it is exclusive.

Exclusivity of Warsaw Cause of Action

In determining whether the Warsaw Convention creates the exclusive cause of action in cases such as the instant case, it is important to look at the history and language of the Convention. The history behind the Warsaw Convention reveals that there were two basic goals underlying the drafting of the Convention. As the Eleventh Circuit has stated, those goals were: (1) "to establish uniformity as to documentation such as tickets and waybills, and procedures for dealing with claims arising out of international transportation"; and (2), the more important goal at that time, "to limit the potential liability of air carriers in the event of accidents and lost or damaged cargo." *Floyd*, 872 F.2d at 1467. In attempting to implement these goals, the Convention did in fact establish requirements for air waybills and tickets, and a limitation was indeed placed on the liability of carriers, although this limitation has since been modified.[4] The Convention also made uniform various procedural rules for claims arising from losses that occur in international transportation.

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3 *See, e.g.*, *Floyd*, 872 F.2d at 1469-70; *In re Mexico City Aircrash*, 708 F.2d 400 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979); *Rhymes v. Arrow Air*, 636 F.Supp. at 740.

4 Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by CAB Order No. E-28680, May 13, 1966, 31 Fed.Reg. 7302 (1966) ("Montreal Agreement").

Although the Warsaw Convention sets forth certain uniform procedural rules with respect to the filing of claims, it is clear that the Convention does not presuppose to make such rules completely uniform. While the Convention sets forth rules on such matters as presumptions of liability, liability limitations, and statutes of limitations, it also leaves many matters to the laws of the sovereign nations that have signed the Convention or adhered to it. In several instances, it even expressly commands the application of the local law of the forum. *See*, *e.g.*, Warsaw Convention Arts. 28(2),[5] 29(2)[6]. The fact that a federal cause of action has been recognized under the Warsaw Convention does not change the fact that the Convention leaves matters to local law. In dealing with problems arising among sovereign nations, the Convention appears to have been unconcerned with the manner in which a forum determined the substance of its local law. The court has found no evidence which would indicate that the Convention was concerned with whether the applicable local substantive law was the result of state law within a federal system of government or national law.

A few courts, including Judge Scott in *Velasquez*, have held that the Warsaw Convention creates the exclusive federal cause of action under which a plaintiff may bring action. Many other courts,[7] including this court in *Rhymes*, have held that the Convention allows causes of action arising under both state law and federal law (the Warsaw Convention), but the Convention provides the exclusive remedy that preempts inconsistent remedies otherwise provided for under

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5 "Questions of procedure shall be governed by the law of the court to which the case is submitted." Warsaw Convention Art. 28(2).

6 "The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted." Warsaw Convention Art. 29(2).

7 In this district alone, in cases arising out of an aircrash of a Pan American flight in 1982, eight judges remanded cases to state court. These judges included Judge Aronovitz, Judge Atkins, Judge Davis, Judge Hastings, Judge Hoeveler, Judge Kehoe, Judge Spellman, and the undersigned. *See* memorandum of Amicus Curiae in Support of Plaintiff's Motion to Remand at 2 n. 2.

state law causes of action. *See Floyd*, 872 F.2d at 1482 n. 33 (collecting cases following these two contrary approaches). The Eleventh Circuit has expressly declined to decide whether the Warsaw Convention preempts state law causes of action, but the Eleventh Circuit's opinions reflect the distinction between the availability of a cause of action under the Convention and the exclusivity of the remedy. *See Floyd*, 872 F.2d at 1469-70, 1482 & n. 33[8]; *St. Paul Insurance Co. v. Venezuelan International Airways, Inc.*, 807 F.2d 1543, 1546 (11th Cir.1987) ("The Warsaw Convention creates the cause of action upon which [the plaintiff] relies and is the exclusive remedy against international air carriers for lost or destroyed cargo.").

Rhymes v. Arrow Air, *supra*, involved a case of wrongful death, stemming from an international air disaster, in state court based on state law. The defendants in *Rhymes*, as the defendants here, removed the case based on the grounds that the wrongful death claims necessarily presented a federal cause of action under the Warsaw Convention. In concluding that removal was improper, this court held that the Warsaw Convention created the exclusive remedy, not the exclusive cause of action, in cases to which the Convention applied.

In the analysis in *Rhymes*, the court focused on the history of the Convention and, more particularly, on the language of Article 24(1). Article 24(1) of the Warsaw Convention states that "any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this convention." Warsaw Convention Art. 24(1) (emphasis added).[9] "The best explanation for the wording of Article

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8 Although the court in *Floyd* declined to decide the exclusive nature of a cause of action founded under the Warsaw Convention, the court nonetheless remanded both the federal cause of action and the parallel state law cause of action to the district court. 872 F.2d at 1467, 1490.

9 Although Subsection 1 of Article 24 applies to claims for damaged baggage or goods, Subsection 2 makes claims for personal injury subject to Subsection 1. Warsaw Convention Art. 24(2). Subsection 2 then goes on to add that Subsection 1 applies "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." *Id.*

24(1) appears to be that the delegates did not intend that the cause of action created by the Convention to be exclusive. For example, in the United States, state law causes of action may be invoked by plaintiffs injured during international air transportation." *In re Mexico City Aircrash*, 708 F.2d at 414 n. 25; *see also Johnson v. American Airlines, Inc.*, 834 F.2d 721, 722 (9th Cir.1987) ("State-law claims . . . can only be maintained subject to the conditions and limits outlined in the Warsaw Convention."); *Tokio Marine & Fire Insurance Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 942 (2d Cir.1980).

As was already noted, various courts, including the *Velasquez* court, have taken the contrary position that a cause of action arising under the Warsaw Convention is the exclusive federal cause of action available to plaintiffs. Instead of analyzing and distinguishing the *Rhymes* opinion, the only place the *Velasquez* opinion even confronts *Rhymes* is in a brief footnote.[10] Moreover, *Velasquez* does not discuss the "however founded" language from Article 24(1), except in a footnote in the order on rehearing. *See Velasquez*, 747 F.Supp. at 678 n. 4.

Velasquez focused on the Convention's concern for uniformity. Judge Scott stated that if separate state law causes of action were allowed to supersede the Convention's exclusivity, air carriers in this country alone would be exposed to 50 separate and distinct causes of action. *Id.* at 676. However, as was discussed previously, the uniformity desired by the drafters of the Convention was not complete and utter uniformity. The Convention itself makes provisions for the application of local law. *See supra* notes 5-6 and accompanying text.

Many of the other courts which state that the Warsaw Convention's cause of action is exclusive have done so without much, if any, discussion; others have simply addressed

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10 "The Court recognizes that its opinion today is contrary to the holding reached by Chief Judge King in *Rhymes v. Arrow Air, Inc.*, 636 F.Supp. 737 (S.D.Fla. 1986). However, having thoroughly considered the reasoning employed in *Rhymes* the Court must respectfully disagree and reach a contrary conclusion." *Velasquez*, 747 F.Supp. at 675 n. 15.

the issue in dicta. Moreover, these cases also generally fail to analyze the 'however founded" language of Article 24(1) and the distinction between remedies and causes of action under the Convention.

By creating an exclusive remedy, the Convention achieved the uniformity desired while still allowing the use of state law. Comments expressed by delegates at the early stages of the negotiations leading up to the Convention may indeed be reflective of a desire to eliminate all reference to the laws of the various sovereign nations in an effort to achieve complete uniformity, but the Convention clearly departed from the desires of those delegates as evidenced by the provisions that call for the use of local law. Those courts who rely on such comments fail to give the proper import to the Convention's "however founded" language and to the express references to state law. Their concerns about uniformity are nonetheless satisfied by the existence of the Convention's exclusive remedy, which, among other things, allows claims not otherwise available under local law to be filed under the Convention and which limits the liability that can be imposed on carriers for claims brought under local law.[11]

For the reasons set forth above, this court holds that the Warsaw Convention does not create the exclusive cause of action in those cases to which it is applicable.

Preemption

Having determined that the Warsaw Convention does not create an exclusive cause of action, this court next addresses whether the defendants can properly remove this case. In

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11 As an exclusive remedy, the Warsaw Convention creates a cause of action which allows suit where a cause of action would not otherwise be available. This result satisfies the uniformity concern of those delegates who desired to assure that relief would be available, even in nations with laws on compensation that "dragged" behind the laws of other nations. Yet, the "however founded" language of Article 24 allows local causes of action "subject to the conditions and limits set out in this convention." Warsaw Convention Art. 24(1). The Convention therefore achieves uniformity by creating a remedy where none exists, as well as by limiting the remedy otherwise available under local laws.

making this determination, the court must look to the plaintiff's complaint. In her complaint, the plaintiff has set forth a claim solely under the Florida Wrongful Death Act, thereby choosing to forego any federal cause of action founded under the Warsaw Convention. As such, the only basis for removal to this court would be founded upon the "well-pleaded complaint" rule. As this court has stated in *Rhymes*, however, because the Warsaw Convention does not provide the exclusive cause of action in cases to which it applies, the plaintiff may, at her election, set forth her claim solely under a state law theory. If, as here, the plaintiff elects to sue solely upon an available state law cause of action, the defendants cannot remove merely by asserting a preemption defense that would limit and condition the state law cause of action. *See Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 1520-21, 103 L.Ed.2d 924 (1989); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63-66, 107 S.Ct. 1542, 1546-47, 95 L.Ed.2d 55 (1987); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *Gully v. First National Bank in Meridian*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936); *Rhymes*, 636 F.Supp. at 742 ("Pleading a defense under the Warsaw Convention as the Defendants have done will not lay a proper basis for removal to this court.").

The plaintiff and the *amicus curiae* have also argued that removal is inappropriate and that a remand is mandated even if this court were to hold that the Warsaw Convention's cause of action is the exclusive cause of action available. Because a ruling on this issue is unnecessary and because it would be based on an interpretation of the Warsaw Convention that this court has declined to follow, this court chooses not to address this issue. The court further wishes to make clear that it expresses no view on the merits of this argument, and this opinion should not be interpreted as either approving or disapproving of the argument set forth by the plaintiff and the *amicus curiae*.

Because the plaintiff has set forth a cause of action under state law without bringing in any federal theory and because the Warsaw Convention's cause of action is not exclusive, the

plaintiff's complaint does not arise under federal law so as to confer removal jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441. While the Warsaw Convention's exclusive remedy may indeed serve to preempt inconsistent and contradictory provisions of the plaintiff's state law theory, this preemption arises only as a defense to the plaintiff's claims. Accordingly, after careful consideration of this matter, this court

ORDERS and ADJUDGES that the plaintiff's motion for remand be, and the same hereby is, GRANTED. This case is hereby REMANDED to the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, Florida.

DONE and ORDERED.

No. 91-688

Supreme Court, U.S.
FILED
NOV 27 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC. and COMMODORE AVIATION, INC.,

Petitioners,

vs.

MARIA BERNARDA ALVAREZ, as Personal Representative of the ESTATE OF AMANDA MARIA ALVAREZ, Deceased, and on behalf of PEDRO P. ALVAREZ and MARIA BERNARDA ALVAREZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit correctly refused to review the district court's order of remand pursuant to 28 U.S.C. § 1447(d)?

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No. 91-688

In The

Supreme Court of the United States

October Term, 1991

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC. and COMMODORE AVIATION, INC.,

Petitioners,

vs.

MARIA BERNARDA ALVAREZ, as Personal Representative of the ESTATE OF AMANDA MARIA ALVAREZ, Deceased, and on behalf of PEDRO P. ALVAREZ and MARIA BERNARDA ALVAREZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent would agree with petitioners' Statement of the Case except in the following regard:

Petitioners' characterization of the district court's order of

remand is inaccurate. The district court reached a single decision to remand the case to the state court based upon its finding that the petitioners had pled no federal cause of action.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied for at least three reasons. First, the United States Court of Appeals for the Eleventh Circuit correctly refused to review the district court's decision remanding this case to the state court. Secondly, even though the issue of the exclusivity of the Warsaw Convention is an important one, appeal of a remand order is not a proper avenue of review, especially when there is pending before this Court a petition for a writ of certiorari in a case where review would be appropriate. Thirdly, the Circuit Court of Appeals' decisions consistently apply this Court's opinions in *Thermatron Products Inc. v. Hermansdorfer,* 423 U.S. 336 (1976) and *Waco v. United States Fidelity and Guaranty Co.,* 293 U.S. 140 (1934), as well as the provisions of 28 U.S.C. § 1447(d).

I.

THE ORDER OF REMAND WAS NOT REVIEWABLE UNDER THE COURT'S DECISION IN *WACO v. UNITED STATES FIDELITY AND GUARANTY CO.* OR OTHERWISE.*

Petitioners seek review of the Eleventh Circuit's dismissal of the petitioners' appeal of the district court's order remanding this case to the state court. Such an appeal is specifically prohibited

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* The Court has previously denied a petition for writ of certiorari brought by petitioners seeking review of the Eleventh Circuit's refusal to review an order of remand arising out of the same air disaster as the subject case. *Aerovias Nacionales de Colombia, S.A. et al. v. Calderon,* S. Ct. No. 91-418.

by 28 U.S.C. § 1447(d) which in pertinent part provides as follows:

> An order remanding a case to the State court from which it was removed was not reviewable on appeal or otherwise . . . .

As such, the Eleventh Circuit's dismissal of petitioners' appeal was entirely proper.

Petitioners seek to avoid § 1447(d)'s straightforward prohibition on appeal by characterizing the district court's order as one falling within a narrow exception to the statute's prohibition. In doing so, petitioners rely upon this Court's decision in *Waco v. United States Fidelity and Guaranty Co.*, 293 U.S. 140 (1934). However, this Court's decision in *Waco* offers no support for petitioners' argument. In *Waco*, this Court established a narrow exception to the ban on review. In that case, the district court dismissed a third-party action which had been the sole basis for federal jurisdiction. As a result of that dismissal, the district court determined that it was without federal jurisdiction and remanded the case to the state court. This court in reviewing the Fifth Circuit's dismissal of an appeal from that order stated as follows:

> True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the district court while it had control of the cause. Indisputably, this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

This exception to the ban on review is patently not applicable to the order in this case. There was no order preceding the order of remand which dismissed any federal claim or party. Neither

does the remand order effect any substantive right of the petitioners. Petitioners are free to raise the Warsaw Convention as a defense in the state court action.

Petitioners cite numerous Circuit Court of Appeals cases which have followed the *Waco* decision and have recognized a right to appeal. While respondent would agree that these cases correctly interpret the *Waco* exception to the ban on review, respondent would disagree that they are at all applicable to the case herein. Some of the cases are almost identical to the *Waco* situation, that is, the district court dismisses the party upon whom federal jurisdiction is based and then remands the case. *See, e.g., Mitchell v. Carlson,* 896 F.2d 128 (5th Cir. 1990); *Allen v. Ferguson,* 791 F.2d 611 (7th Cir. 1986); *Koreza v. Spirito,* 723 F.2d 1003 (1st Cir. 1983); *Armstrong v. Alabama Power Company,* 667 F.2d 1385 (11th Cir. 1982); *Katsaris v. United States,* 684 F.2d 758 (11th Cir. 1982); and *Southeast Mortgage Company v. Mullins,* 514 F.2d 747 (5th Cir. 1975). As in *Waco,* the order of dismissal was reviewable in these cases.

The other cases involve situations where the district court made a substantive decision, completely separate and distinguishable from any jurisdictional decision, which dictated remand of the case. The most prevalent of such decisions involves the interpretetion of "forum-selection clauses." In fact, the other cases cited by the petitioners are either forum-selection or forum-waiver cases. *See Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.,* 741 F.2d 273 (9th Cir. 1984); *Foster v. Chesapeake Insurance Company,* 933 F.2d 1207 (3d Cir. 1991); *Regis Associates v. Rank Hotels (Management) Ltd.,* 894 F.2d 193 (6th Cir. 1984); *Karl Koch Erecting Co. v. N.Y. Convention Center Dev. Corp.,* 838 F.2d 656 (2d Cir. 1988); *Clorox v. United States District Court for the Northern District of California,* 779 F.2d 517 (9th Cir. 1985).

The "forum-selection clause" exception to § 1447(d)'s ban on review was first recognized by the Ninth Circuit in *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984). In that case, Pelleport brought a contract claim against Budco in the state court. Budco subsequently removed the case to the federal district court where Pelleport filed a motion for remand arguing that a forum-selection clause in the contract required the case to be in the state court. The district court determined that the forum-selection clause was valid and enforceable and remanded the case.

On appeal, the Ninth Circuit held "the district court's contract interpretation is appealable" because "it reached a substantive decision on the merits apart from any jurisdictional decision". *Pelleport*, 741 F.2d 276-277. In addition, the court found the order interpreting the contract was reviewable, because it was conclusive on the question, and to refuse the appeal deprived Budco of a right to appeal a substantive determination of contract law.

The Ninth Circuit capsulized its *Pelleport* decision in the case of *Clorox v. United States District Court for the Northern District of California*, 779 F.2d 517 (9th Cir. 1985), stating:

> When a district court's remand order is based on a resolution of the merits of soms matter of substantive law "apart from any jurisdictional decision", § 1447(d) does not foreclose appellate review of that decision.

Clorox, 779 F.2d at 520.

Clearly the *Pelleport* line of decisions has no applicability to the instant case. This fact is demonstrated by the opinions in *Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989), and *Glasser v. Amalgamated Workers' Union Local 88*, 806 F.2d

1539 (11th Cir. 1986), as well as *Survival Systems Division of the Whitaker Corporation v. United States District Court of the Southern District of California*, 825 F.2d 1416 (9th Cir. 1987), and *Whitman v. Raley's Inc.*, 886 F.2d 117 (9th Cir. 1989).[1] In *Glasser*, the plaintiff brought a state court claim against the union alleging that he had been wrongfully denied certain medical benefits under an employee-benefit plan. The union removed the case to the district court claiming that the Employee Retirement Income Security Act (ERISA) preempted all of the plaintiff's state claims. The district court found that the plaintiff's only pled state law claims and that appellant's federal claims were merely defenses. Applying the well-pled complaint rule, the district court concluded that it lacked jurisdiction and remanded the case to the state court.

On appeal, the union sought to argue that the court should adopt the "matter of substantive-law" exception created by the Ninth Circuit in *Clorox* and *Pelleport*. However, as the Eleventh Circuit court noted, the exception is a narrow one.

> [I]t permits appellate review of a district court remand order only where that order is based solely on a matter of substantive law. It expressly does not permit review of a remand order based on a lack of jurisdiction. *Clorox*, 779 F.2d at 520. *Pelleport*, 741 F.2d at 276-77. Therefore, we will not consider whether we will adopt this exception because, even if we did, the remand order in the

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1. Petitioners argue that the court's decisions in *Glasser* and *Hansen* are not applicable because the district court's remands therein were based upon their finding that the federal law which the defendants invoked to support removal did not apply to the factual allegations in the complaint. In *Glasser*, this is clearly not the case. As for *Hansen*, although the district court found that federal law did not apply, the reasoning of ths Ninth Circuit is still very instructive.

> instant case would not be appealable. The district court expressly based its decision to remand on the conclusion that it lacked subject matter jurisdiction.
>
> It is true, as in *Clorox* and *Pelleport*, the decision underlying the remand order involved a conclusion of substantive law. However, unlike in those cases, *here the substantive-law decision related to the question of jurisdiction; the remand order did not affect the substantive rights of the parties. Compare Clorox*, 779 F.2d at 520; *Pelleport*, 741 F.2d at 276-77. In particular, the court did not reach the merits of the preemption argument. The state court may, in fact, rule that ERISA does preempt appellee's state-law claims and that appellees must proceed as appellants contend, under § 1132(a)(1)(B) of ERISA.

(Emphasis added.) *Glasser*, 806 F.2d at 1540.

In *Hansen*, Mrs. Hansen brought a claim in the state court against Blue Cross for failure to pay insurance benefits. Blue Cross removed the action based solely on the existence of a federal question contending that Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, (ERISA) preempted the state-law claims. The district court determined that under the allegations of the complaint, Hansen's claims were not ERISA claims because she had paid her own premiums. Accordingly, the district court remanded the case. In this regard, petitioner is correct that the decision to remand was based upon the court's determination that the federal law did not apply to the plaintiff's claim. However, this fact offers no support to petitioners and was rejected by the Ninth Circuit. On appeal, before the Ninth Circuit, Blue Cross argued that because the district court made a factual determination

that Hansen paid her own premiums and then concluded that her policy was not covered by ERISA that the order was reviewable. The Ninth Circuit disagreed stating that the district court had not decided a disputed issue of fact, but merely looked to the allegations of Hansen's complaint. Secondly, the Ninth Circuit found *Pelleport* did not apply because:

> Blue Cross fails to demonstrate how the district court's legal decision was *apart* from the question of subject-matter jurisdiction as required to fall within the exception to non-reviewability establishsd by *Thermatron* and its progeny . . . . In deciding whether subject-matter jurisdiction exists, a district court will reach legal conclusions concerning the presence of diversity or a federal question. Blue Cross merely disagrees with the legal conclusion that the district court drew . . . . Assuming, without holding, that such a decision is erroneous, section 1447(d) precludes review of remand ordsrs based on lack of subject-matter jurisdiction even when the decision is wrong.

Hansen, 891 F.2d at 1388.

Blue Cross also argued that it could appeal the district court's finding that Hansen's complaint was not an artfully pled state-law claim. However, as the Ninth Circuit noted:

> A district court's decision that a complaint is not artfully pled is a jurisdictional decision related to the application of the well-pleaded complaint rule.

Hansen, 891 F.2d at 1389.

Similarly, in the case of *Survival Systems Division of the*

Whitaker Corporation v. United States District Court of the Southern District of California, 825 F.2d 1416 (9th Cir. 1987), the plaintiff brought a state-court action asserting various wrongful discharge claims and claims for intentional and negligent infliction of emotional distress against her employer. The employer removed the case to the federal court based on preemption under federal labor law. The court found that all but one of the employee's claims was preempted by the National Labor Relations Act and thus dismissed them. However, it found that her claim for intentional infliction of emotional distress was not preempted. Based upon this finding, the district court remanded the emotional distress claim to the state court. The employer appealed relying upon the Ninth Circuit's previous decisions in *Pelleport* and *Clorox.* The Ninth Circuit denied review stating as follows:

> In this case, the order of remand did not resolve a matter of substantive law, as in *Pelleport* or *Clorox.* The ruling of the district court was that the state cause of action alleged in Rodriquez' complaint was not an artfully pled federal claim that was preempted by federal labor law. This did not finally resolve the issue of preemption, which could still be raised as a defense to the state claim in the state court. Thus, if the proof in state court were such as to justify the conclusion that the cause of action was completely preempted by federal labor law, the defense of preemption could be sustained. The ruling of the district court was simply that the allegations of the complaint did not justify such a result.
>
> Thus, the only issue decided by the remand ordsr is the jurisdictional issue that the claim of intentional infliction of emotional distress was a state claim and not an artfully pled federal claim.

> The district judge then exercised her discretion in remanding that state claim. Therefore, the remand is not reviewable on appeal as a substantive decision under the doctrine of *Pelleport* and *Clorox*.

Survival Systems, 825 F.2d at 1418.

Finally, in two companion cases out of the Ninth Circuit, *Whitman v. Raley's Inc.*, 886 F.2d 117 (9th Cir. 1989) and *Krentz v. Connecticut General Life Insurance Company,*[2] 886 F.2d 117 (9th Cir. 1989), the court posed the following issue and response:

> Does 28 U.S.C. § 1447(d) bar review of remand orders that are based on a finding that federal law does not completely preempt plaintiff's state claims? We hold that it does.

In reaching this decision, the court applied the following reasoning:

> A distinction must be drawn between the inquiry the district court faces in considering whether a case was properly removed and the inquiry as to whether a preemption defense exists. At the removal stage, the inquiry is solely whether congress intended a preemptive force so powerful as to displace entirely any state cause of action within the ambit of the federal cause of action . . . .

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2. In *Whitman*, the issue raised was whether § 301 of the Labor Management Relations Act completely preempted plaintiff's state claims. And in *Krentz*, the issue was whether or not ERISA completely preempted plaintiff's state claims.

This jurisdictional issue of whether "complete preemption" exists is very different from the substantive inquiry of whether a "preemptien defense" may be established. The jurisdictional question concerning "complete preemption" centers on whether it was the intent of Congress to make the cause of action a federal cause of action and removable despite the fact that the plaintiff's complaint identifies only state claims. The latter inquiry, concerning a "preemption defense", is a substantive inquiry as to whether a legal defense exists. This would be a matter for trial by a court having jurisdiction. The possible existence of a "preemption defense" does not justify removal . . . .

On a remand petition where the removal petition is based on complete preemption, the sole issue before the district court is whether the plaintiff's claim is one of those claims that is "complstely preempted" by federal law. If the court rules that the claim is not "completely preempted", the federal court lacks jurisdiction to rule on the substantive preemption defense.

A remand based on lack of "complete preemption" is a remand required by 28 U.S.C. § 1447(c) . . . . When a case is remanded on the ground that the federal court is without jurisdiction pursuant to § 1447(c), the remand order "is not reviewable on appeal or otherwise". 28 U.S.C. § 1447(d); *Thermatron Products Inc. v.*

Hermansdorfer, 423 U.S. 336 (1976).[3]

As one can see, neither *Waco* or its progeny in any way support review of the order of remand entered by the district court in this case. Petitioners have failed to demonstrate that the district court's legal decision regarding the Warsaw Convention was apart from the question of subject-matter jurisdiction. The ruling of the district court was that the state cause of action alleged in respondent's complaint was not an artfully pled federal claim that was preempted by federal law. The only issue decided by the remand order was the jurisdictional issue that plaintiff's claim was a state claim and that the federal court thus lacked jurisdiction to hear the matter. This did not finally resolvs the issue of whether or not the Warsaw Convention applies to the case because this can still be raised as a defense to the state claim in the state court. The remand in this case was based on the lack of "complete preemption", and thus was a remand required by 28 U.S.C. § 1447(c). When a case is remanded on the ground that the federal court is without jurisdiction pursuant to § 1447(c), remand order is not reviewable on appeal or otherwise. *Thermatron Products Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). As such, the Eleventh Circuit properly dismissed petitioners' appeal. This Court should likewise deny petitioners' petition for a writ of certiorari.

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3. The reasoning in *Whitman/Krentz* was followed by the Fifth Circuit in *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406 (5th Cir. 1991).

II.

ALTHOUGH THE EXCLUSIVITY OF THE WARSAW CONVENTION IS AN IMPORTANT ISSUE, REVIEW OF AN ORDER OF REMAND IS NOT THE PROPER AVENUE TO ADDRESS THE ISSUE.

Respondent would agree that the issue of whether the Warsaw Convention provides plaintiff's exclusive cause of action is an important issue. However, respondent strongly disagrees that this petition for writ of certiorari is the appropriate avenue for this Court to address that issue. It is noted by petitioner that this Court has on several occasions addressed the Warsaw Convention but always as the result of a proper avenue of review. Moreover, the plaintiffs in *In re Air Disaster at Lockerbie, Scotland, on December 21, 1988*, 928 F.2d 1267 (2d Cir. 1991), *cert. filed*, No. 91-259 (Aug. 12, 1991) have petitioned this Court for review of the Second Circuit ruling on the exclusivity issue. As such, this Court does have an appropriate avenue to review the issue of the Warsaw Convention's exclusivity should it wish to do so.

III.

THE CIRCUIT COURTS OF APPEALS' DECISIONS REGARDING REVIEW OF REMAND ORDERS ARE CONSISTENT.

Petitioners' assertion that the Circuit Courts of Appeals differ widely in their determination of the reviewability of remand orders is erroneous. As demonstrated earlier, the Circuit Courts of Appeals have been able to properly apply the criteria set forth by this Court in *Thermatron Products Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) and *Waco v. United States Fidelity and Guaranty Co.*, 293 U.S. 140 (1934).

Where the district courts entered an order dismissing a federal party or claim prior to the order of remand, the Circuit Courts of Appeals have appropriately allowed review of the order of dismissal. The courts have also allowed review of substantive orders which precede the order of remand and which decide substantive issues completely separate from jurisdiction which are binding upon the parties.

The Circuit Courts of Appeals have also consistently refused to review orders of remand in situations where the order of remand is based upon a substantive decision which is intrinsically intertwined with a jurisdictional issue. Such courts have correctly interpreted this Court's decision in *Thermatron* as banning review of remand orders issued under 28 U.S.C. § 1447(c). Where, as here, the decision to remand the case is based upon a district court's finding that it is without jurisdiction to hear the matter, the courts have correctly dismissed appeals of the remands. Petitioner is unable to point to a single case where under such circumstances a Circuit Court of Appeals has granted review. The Circuit Courts' interpretation is not an expansion on the prohibition found at 28 U.S.C. § 1447(d), rather it is merely a proper interpretation of a straightforward legislative enactment prohibiting review. If petitioners are dissatisfied with the ban on review of remand orders, the avenue for relief is through the legislative process not by insupportable judicial interpretation of the statute.

CONCLUSION

In conclusion, the petition for a writ of certiorari should be denied.

Dated: November 27, 1991

Respectfully submitted,

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No. 91-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AEROVIAS NACIONALES DE COLOMBIA, S.A., AVIANCA, INC., and COMMODORE AVIATION, INC.,

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—v.—

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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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IN THE

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Respondents.

REPLY BRIEF OF PETITIONERS

This case presents the precise problem which Petitioners sought to have the Court prevent by granting review in the petition for a writ of certiorari in *Aerovias Nacionales de Colombia v. Calderon*, No. 91-418, 112 S. Ct. 376 (1991), *denying cert. to*, 929 F.2d 599 (11th Cir. 1991). A small group of federal district court judges in the Southern District of Florida are thwarting the intended goals of the Warsaw Convention and the Congressional objectives set forth in the multidistrict litigation procedures which are intended to assure the "just and efficient conduct" of civil actions involving common questions of fact (28 U.S.C. § 1407). These judges continue to hold that the cause of action created by the Warsaw Convention is not exclusive, in order to deprive a defendant of the right to removal.

In refusing appellate review of these decisions, the Eleventh Circuit is condoning this conduct. The umbrella of non-reviewability of remand orders set forth in 28 U.S.C. § 1447(d) is being used to shield from review at any time a pre-remand decision by a district court that the Warsaw Convention cause of action is not exclusive.

Respondents recognize in their Opposition Brief that the issue of the exclusivity of the Warsaw Convention cause of action is an important one but argue that appeal of a remand order is not a proper avenue of review.[1] Opp. Brief at 2, 13. Respondents miscomprehend Petitioners' argument. What must be reviewed is the Eleventh Circuit's consistent failure to review the lower courts' decisions, made **prior** to remand, that the Warsaw Convention cause of action is not exclusive.

Respondents misread *Waco v. United State Fidelity and Guaranty Co.*, 293 U.S. 140 (1934). *Waco* **does** provide an avenue for review of pre-remand decisions which affect the substantive rights of the parties, such as the decision at issue in this case. As in *Waco*, the decision of the District Court here, although only entered as part of a "single decree", in effect encompassed two orders. First, the District Court concluded that the Warsaw Convention cause of action is not exclusive and second, upon the basis of the first decision, the District Court then held that it lacked jurisdiction and remanded the action to state court. "[I]n logic and in fact the decree", that the Warsaw Convention cause of action is not exclusive, "preceded that of remand and was made by the District Court while it had control of the cause." *Waco*, 293 U.S. at 143. It is this order which was the subject of the appeal and not the order of remand.

Interestingly, Respondents now argue that the District Court decision "did not finally *resolvs*[*sic*] the issue of

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1 Respondents further argue that review especially is not proper because "there is pending before this Court a petition for a writ of certiorari" (Opp. Brief at 2) in *Rein v. Pan American World Airways, Inc.*, No. 91-259. The Court, however, denied the certiorari petition in *Rein* on October 15, 1991, 112 S. Ct. 331 (1991).

whether or not the Warsaw Convention applies to the case because this can still be raised as a defense . . . in the state court." Opp. Brief at 12. The issue, however, is not whether the Convention applies, because it indisputably does, but rather what is the effect of the Convention's application to the rights of the parties. Respondents have failed to address the crux of the matter, namely, that the District Court's exclusivity decision affects the substantive rights of Petitioners and may be conclusive in the state court proceedings.

If the Court does not grant review, the Eleventh Circuit will not have an opportunity to provide guidance to the district courts within its jurisdiction as to the exclusivity of the Warsaw Convention cause of action in a case involving "international transportation" as defined by the treaty. Therefore, the conflict in the Southern District of Florida on this question, which presently exists, will only be perpetuated.

Virtually every other action arising out of this accident (approximately 122) will be litigated against Petitioners and the United States in the MDL proceeding pending before the Honorable Thomas C. Platt, Chief Judge of the United States District Court for the Eastern District of New York, to whom the 122 cases have been assigned by the Judicial Panel on Multidistrict Litigation.[2] The chaos which will result in this litigation, and other similarly situated litigation,[3] if the Court does not review this case is best exemplified by the comments of Chief Judge Platt at a pretrial conference held on November 15, 1991. Chief Judge Platt expressed grave concern that the situation created by the Southern District of

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2 Chief Judge Platt also is the judge to whom all cases arising out of the *Pan Am/Lockerbie* disaster have been assigned by the MDL Panel.

3 Similar issues have arisen in the *Pan Am/Lockerbie* litigation, where Chief Judge Platt recently noticed the same problem created by the Southern District of Florida in refusing to recognized the exclusivity of the Warsaw Convention cause of action, and in *Galbiati, et al. v. Independent Air, Inc., et al.*, No. 91-618 (S.D. Fla. Apr. 24, 1991), *appeal dismissed*, No. 91-5466 (11th Cir. Oct. 3, 1991), which involves over 120 actions arising out of the crash of an aircraft in The Azores, Portugal, en route from Italy to the Dominican Republic.

Florida has resulted in cases arising out of the same air disaster being litigated on parallel tracks in two different jurisdictions, one federal and one state. If the conflict between the various judges of the Southern District of Florida as to the exclusivity of the Warsaw Convention cause of action is not resolved, this will result in at least two trials being required involving the same issues, but applying different legal principles. Such a result is directly contrary to the purpose of the MDL procedure and the goal of uniformity expressed in the Warsaw Convention.

The reviewability issue presented in the petition herein should be resolved by the Court to prevent the selective geographical undermining of the Warsaw Convention. The Court, therefore, should cut through the procedural barbed wire of 28 U.S.C. § 1447(d) and decide whether the Eleventh Circuit is correct in refusing to recognize the non-exclusivity decision of the District Court as an appealable final collateral order under *Waco* and *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), notwithstanding that the decision preceded a remand order.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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